

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

JUL 22 2009


CLERK

BYRON K. RED KETTLE,)	CR. 87-50067-RHB
)	
Petitioner,)	
)	
vs.)	ORDER
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

Petitioner has filed a motion for correction of his sentence pursuant to Federal Rule of Civil Procedure 35. Docket #9. Federal Rule of Civil Procedure 35 concerns physical and mental examinations, and has no bearing whatsoever on petitioner's request for relief. In the event that petitioner intended to base his motion upon Federal Rule of *Criminal* Procedure 35, the Court notes that such relief is available only upon the government's motion. See FED. R. CRIM. P. 35(b)(1),(2). The government has made no such motion in this case.

Petitioner also suggests that jurisdiction is conferred upon this Court by virtue of Federal Rule of Civil Procedure 60(b) and (d). The Court does not agree. Rule 60(b) applies only to civil cases, and Rule 60(d) "provides for extraordinary relief on a showing of exceptional circumstances." United States v. Eggleston, 24 Fed. Appx. 656 (8th Cir. 2002); Fox v. Brewer, 620 F.2d 177, 180 (8th Cir. 1980). This is not a civil case, and

the Court finds no exceptional circumstances to warrant the exercise of jurisdiction pursuant to Rule 60(d). Furthermore, while Rule 60(d) “may operate indirectly to allow appellate review of a decision not timely appealed, it is not a substitute for appeal.” Id. (citations omitted).

If petitioner wanted to challenge the validity of the restitution component of his sentence, he was required to do so by way of a direct appeal. Petitioner did not directly appeal his conviction or sentence, and the relief he is seeking is not available through post-conviction proceedings. Accordingly, it is hereby


ORDERED that petitioner’s motion to correct his sentence (Docket #9) is denied.

IT IS FURTHER ORDERED that petitioner’s motion to appoint counsel (Docket #10) is denied.

IT IS FURTHER ORDERED that petitioner’s motion to proceed *in forma pauperis* (Docket #12) is dismissed as moot.

Dated this 21st day of July, 2009.

BY THE COURT:


RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE